

No. 11713

**In the United States Circuit Court of Appeals
for the Ninth Circuit**

FREDERICK JOHN WOLFE, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

**ON PETITION FOR REVIEW OF THE DECISION OF THE TAX
COURT OF THE UNITED STATES**

BRIEF FOR THE RESPONDENT

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FILED

MAR 17 1968

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OPINION BELOW

The only previous opinion in the present case is that of the Tax Court (R. 14-40), which is reported in 8 T. C. 689.

JURISDICTION

This petition for review (R. 41-44) involves federal income taxes for the year 1941. On December 11, 1944, the Commissioner of Internal Revenue mailed to the petitioner a notice of deficiency for the year 1941 in the amount of \$1,101.49. (R. 9-12.) Within ninety days thereafter and on March 5, 1945, the petitioner filed a petition with the Tax Court of the United States for a redetermination of the deficiency under the provisions of Section 272 of the Internal Revenue

Code. (R. 2, 4-8.) The decision of the Tax Court that there was a deficiency for the year 1941 in the amount of \$1,101.49 was entered on April 1, 1947. (R. 40.) The case is brought to this Court by a petition for review filed on June 25, 1947 (R. 41-44), pursuant to the provisions of Sections 1141-1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether the payments received by the taxpayer during the taxable year 1941 under a contract between his former employer, a third party, and himself as compensation for past services constituted gross income under Section 22 (a) of the Internal Revenue Code and the applicable Treasury Regulations.

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) [as amended by Section 1 of the Public Salary Act of 1939, c. 59, 53 Stat. 574] *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * * of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *.

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

* * * *

(2) *Annuities, Etc.*—Amounts received (other than amounts paid by reason of the death of the insured and interest payments on such amounts and other than amounts received as annuities) under a life insurance or endowment contract, but if such amounts (when added to amounts received before the taxable year under such contract) exceed the aggregate premiums or consideration paid (whether or not paid during the taxable year) then the excess shall be included in gross income. Amounts received as an annuity under an annuity or endowment contract shall be included in gross income; except that there shall be excluded from gross income the excess of the amount received in the taxable year over an amount equal to 3 per centum of the aggregate premiums or consideration paid for such annuity (whether or not paid during such year), until the aggregate amount excluded from gross income under this chapter or prior income tax laws in respect of such annuity equals the aggregate premiums or consideration paid for such annuity. * * *

* * * *

(26 U. S. C. 1940 ed., Sec. 22.)

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.22 (a)-2. *Compensation for personal services.*—Commissions paid salesmen, compen-

sation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, pay of persons in the military or naval forces of the United States, retired pay of Federal and other officers, and pensions or retiring allowances paid by private persons or by the United States are income to the recipients * * *.

STATEMENT

The facts as found by the Tax Court (R. 16-26) are substantially as follows:

The taxpayer is an individual and filed an income tax return for the year 1941 with the Collector of Internal Revenue for the Sixth District of California. The taxpayer is a citizen of Canada. From his birth in 1879 to 1931 he was a resident of Canada, and from 1931 to October 4, 1941, prior to coming to the United States, he was a resident of England. (R. 16.)

In 1902 the taxpayer entered the employ of the Queen City Oil Company, Ltd., a Canadian corporation, which company in 1911 or 1912 was absorbed by the Imperial Oil Company, Ltd. (hereinafter referred to as Imperial), a Canadian corporation. The taxpayer continued in the employ of Imperial until March 1, 1931. The stock of Imperial was largely held by the Standard Oil Company of New Jersey (hereinafter referred to as Standard). (R. 16.)

Two or three months prior to March 1, 1931, the taxpayer was requested by the senior vice president of Imperial to go to England and take over the duties of the managing director of the Anglo-American Oil Company, Ltd. (hereinafter referred to as Anglo), an

English corporation. On March 1, 1931, the taxpayer became managing director, and later in 1931, chairman, of the board of Anglo. Anglo was stock controlled by the Standard Oil Export Corporation, which, in turn, was stock controlled by Standard. (R. 16-17.)

Prior to March 1, 1931, the taxpayer had conversations with officers of both Standard and Standard Oil Export Corporation to obtain knowledge of the background of Anglo. The amount of salary that he was to receive from Anglo was discussed between the taxpayer and the senior vice president of Imperial. It was the understanding when the taxpayer undertook the assignment of chairman and managing director of Anglo, at the request of Standard, that if he was eventually retired from the service of Anglo he would receive a life annuity based on the provisions of the superannuation scheme of Anglo in effect on the date of retirement and that payment of such pension in sterling would be guaranteed by Standard in dollars at an exchange rate of \$5 to the pound. Before the taxpayer went to England he knew that Anglo had a scheme or plan in existence for paying its retired employees. The taxpayer did not know much about the actual details at that time, but he knew that the basis of the plan was as follows: An employee was entitled on retirement to roughly 2% per year of service, based on a maximum of 75%, and the average of the last five years' pay. Retirement at 60 for one who had the full 37½ years of service would be about 66.3%. (R. 17.)

After the taxpayer went to England, and prior to October 22, 1931, he discussed with the executives of Anglo the question of payments to be made to him in the event of his retirement from the services of that company. The taxpayer told them very "plainly" that he wanted to be considered on the same basis as those who were under the superannuation plan. On August 20, 1931, J. W. Myers, then secretary of Standard's committee on annuities and benefits, wrote D. L. Harper, in charge of foreign sales for Standard, as follows (R. 18):

Mr. D. L. HARPER,
Building.

DEAR MR. HARPER: In reply to your letter of August 14th, regarding Mr. F. J. Wolfe's service record, this will confirm our conference with Mr. Wolfe the other day to the effect that this question is to be deferred until the Anglo American Oil Company has revised its Annuity Plan. This decision is based on the probability that any such Plan will fully take care of Mr. Wolfe's case. Of course, if it does not, the matter will have to be given special consideration at the proper time.

Very truly yours,

(s) J. W. MYERS,
Secretary.

JWM: G

(Notation) 11/29/33

Anglo is to adopt service credit rules basically the same as those of S. O. Co. (N. J.), with such additions as will care for employees of their own subs. Follow this point when plan is in final shape.

After some discussion, it was decided that the taxpayer was to be treated as if he had been in the employ of Anglo from the date in June, 1902, when he was first employed by the Queen City Oil Company, Ltd. The board of directors of Anglo passed a resolution to that effect on October 22, 1931, which reads as follows (R. 19) :

Resolved, it being part of the arrangement with Mr. Wolfe on his joining the Board of this Company, and becoming Managing Director, that for the purpose of calculating pension payable by this Company to him, his services shall be deemed to commence from June, 1902, on which date he joined the Queen City Oil Co., Ltd., (which was subsequently absorbed by the Imperial Co., Ltd., of Canada) and that he be entitled to pension on the same basis as employees benefiting under the Company's Superannuation Scheme dated 31st December, 1925, or any subsequent modification thereof.

In 1939 the taxpayer informed Anglo that he wished to retire and live in the United States and that he wished his "annuity" to be paid in United States dollars at \$5 to the pound. Discussions were had with officials of Anglo and of Standard to this end. Various procedures for paying the taxpayer were discussed by Standard, Anglo, and the taxpayer. Among them was a proposal to purchase an annuity for the taxpayer from a commercial insurance company. This proposal was never accepted or put into effect (R. 19).

Under date of June 21, 1939, one of the staff on Standard's committee on annuities and benefits fur-

nished to F. W. Pierce, executive assistant to the president of Standard, a memorandum, in pertinent part, expressing doubt whether a purchase of such a large amount could be made from an insurance company, and that Equitable had indicated that they would, if asked to write such a contract, have to think it over; also enclosing a table showing "approximate capital value of Mr. Wolfe's annuity," assuming retirement at July 1, 1940, to have a "total cost" of \$467,165, for an annuity of \$34,131 (based on exchanges at \$4.68 on June 20, 1939). (R. 20.)

Under date of June 29, 1939, F. W. Pierce wrote T. C. McCobb, a member of the board of directors of Standard, on the subject "Retirement of F. J. Wolfe," stating, in part, as follows (R. 20-21):

We understand that under the agreement with Mr. Wolfe, he is to receive, upon retirement, a life annuity calculated in accordance with the Anglo Plan and their discount absorption program (the latter being indential to ours), the annuity to be payable in the United States in dollars converted at the rate of \$5.00 to the pound. * * *

The procedure which is to be followed in respect of payment and transfer of funds has been discussed with Mr. Wolfe and we find that it presents some problems. However, subject to proper approval, it is proposed that the annuity be paid by New York in dollars, converted at the rate of \$5.00 to the pound. In view of the uncertainties of the future and in order to assure that the necessary funds be

available here when needed, it is further proposed that Anglo transfer to S. O. Co. of N. J. for deposit to the subaccount for assigned expatriates in the Annuity Fund the estimated present value of Anglo's liability, assuming retirement as of January 1, 1940, computed on a 3% interest basis and discounted for mortality but not for labor turn-over due to any other cause. This transfer would be dollars at the rate of exchange prevailing at the time of payment. If retirement occurs at a later date, Anglo would make the necessary additional capital contribution. In the event of Mr. Wolfe's death prior to retirement, the capital contribution plus 3% interest, compounded annually, would be returned to Anglo unless the pension had meanwhile been insured in which event, the premium refund, if any, would be determined in accordance with the provisions of the insurance contract under which it was purchased. Any cost incurred in New York by reason of a sterling rate less than \$5.00 would be absorbed by Jersey and charged to such account as may be later determined. The Anglo sterling pension capital contribution would possibly not be a deductible item for income tax purposes so far as concerns Anglo.

A table set forth in the letter showed the "annual annuity" assumed effective July 1, 1940, to be \$36,465 (dollars at \$5 per pound) and \$34,131 (dollars at \$4.68). (R. 22.)

Under date of August 4, 1939, R. A. Carder, an official and secretary of Anglo, in charge of finances,

wrote Frank Pierce, "Annuities & Benefits Dept.," a letter, stating in part, as follows (R. 22):

* * * the procedure [retirement of F. J. Wolfe] proposed entails obligations on all three parties affected and is of considerable importance, it seems to us that by far the best method of dealing with the matter is to embody the arrangement in a simple three-party agreement.

Pencil notations appear at the bottom of the letter as follows (R. 22):

£87,177 at 4.68—408,988; at 5.00—435,885.
Group Annuity * * *, our estimated cost
at 3%—491,000. Without loading 451,000.

A letter from an official of Standard to R. A. Carder, an official of Anglo, under date of January 9, 1940, indicated that final arrangements had been made, satisfactory to the taxpayer, so that his retirement would become effective July 1, 1940. (R. 22.) The letter contained, in part, the following (R. 22-23):

Final arrangements have been made, satisfactory to Mr. Wolfe, so that his retirement will become effective July 1, 1940. Although our formal setup for taking care of the annuity is not completed, we have undertaken to guarantee Mr. Wolfe that the money which you have provided, plus the additional amounts which Standard Oil Co. of New Jersey will be required to put up, will be used to assure him the annuity to which he is entitled, and there is no reason, therefore, why you should not formally record the transaction.

It was ultimately decided to handle the matter by having Anglo transfer to Standard the present value of Anglo's pension liability to the taxpayer and having Standard pay the taxpayer monthly in dollars. During the time the taxpayer was employed by Anglo his salary was £11,000 per year, and the salary did not vary in the last five years of his service. (R. 23.)

On March 22, 1940, T. W. Pierce wrote R. A. Carder, enclosing three copies of "an agreement of annuity." Reference was made to "Anglo's initial contribution." (R. 23.) The agreement under date of March 22, 1940, referred to in the letter of March 22, 1940, and drawn by an official of Standard, entered into between Anglo, Standard and the taxpayer, reads in pertinent part as follows (R. 23-26):

Whereas, Mr. Wolfe is Chairman and Managing Director of the Anglo Company and on March 1, 1931, undertook this assignment at the request of the Standard Company on the understanding that if he were eventually retired from the service of the Anglo Company he would receive a life annuity based on the provisions of the superannuation scheme of the Anglo Company as in effect on the date of retirement and that payment of such sterling pension would be guaranteed by the Standard Company in dollars at an exchange rate of five dollars to the pound.

And Whereas, Mr. Wolfe is to be retired from the service of the Anglo Company on the first day of July, 1940.

And Whereas, the Anglo Company is unable to grant formally an annuity to Mr. Wolfe under its own superannuation scheme or pay

same from its superannuation fund for the reason that such scheme and related fund are not applicable to any person who entered the employ of the Anglo Company subsequent to May 18, 1928.

And Whereas, the Anglo Company desires to recognize Mr. Wolfe's valuable services to the Anglo Company by contributing to the Standard Company a capital sum of £89,1200-0-0 representing the liability which it would have incurred had it granted Mr. Wolfe a sterling pension equivalent to that payable under the superannuation scheme of the Anglo Company.

And Whereas, the Standard Company has agreed to accept the aforesaid £89,120-0-0 from the Anglo Company and to pay Mr. Wolfe a life annuity as hereinafter provided.

Now It Is Hereby Witnessed as follows:

1. That in consideration of the aforesaid understanding with Mr. Wolfe the Standard Company hereby covenants to pay Mr. Wolfe a life annuity of \$3,038.75 per month, effective July 1, 1940, with the understanding that should Mr. Wolfe's present wife, Marguerite W. Wolfe, survive him, monthly payments in the amount of \$3,038.75 each will be continued and paid to her for a period not to exceed twelve months and in no case beyond the date of her death.

2. Mr. Wolfe hereby accepts this annuity settlement as a complete discharge of any and all pension obligations of the Standard Company, the Anglo Company and any other associated companies.

3. In consideration of Mr. Wolfe's valuable services to the Anglo Company, the Anglo Company has paid to the Standard Company, as a

contribution toward the cost of the annuity settlement, the sum of £89,120-0-0, the receipt of which sum the Standard Company doth hereby acknowledge.

4. In consideration of the aforesaid payment the Standard Company hereby indemnifies and for all time agrees to keep indemnified the Anglo Company from and against any liability which the Anglo Company might otherwise have had to Mr. Wolfe in respect to a pension.

5. If Mr. Wolfe shall die prior to July 1, 1940, then the Standard Company will forthwith on the death of Mr. Wolfe being proved to their reasonable satisfaction repay to the Anglo Company the £89,120-0-0 paid to the Standard Company by the Anglo Company under clause 3. hereof with interest thereon at the rate of 3% per annum from the date of payment until the date of repayment.

6. If Mr. Wolfe shall die on or after July 1, 1940, then the Standard Company shall be under no obligation to repay to the Anglo Company any portion of the sum of £89,120-0-0 paid to the Standard Company by the Anglo Company under clause 3. hereof.

The sum of £89,120-0-0, stated in paragraph 3 of the agreement dated March 22, 1940, had been paid by Anglo to Standard as follows: £87,177-0-0 on August 22, 1939, which was converted into \$408,097.33 in United States currency at the official rate of exchange on that date, and £1,943-0-0 on December 31, 1939, which was converted into \$7,689.42 in United States currency at the official rate of exchange on that date. The taxpayer had no control over the payments of the £89,120-0-0 by Anglo to Standard in 1939 and he

paid no income tax to England or Canada on those sums. (R. 26.)

The taxpayer retired from the employ of Anglo on July 1, 1940. At this date he was 60 years of age. Beginning with a payment on July 31, 1940, the taxpayer received \$3,038.75 per month down to the date of the trial pursuant to the contract dated March 22, 1940. Standard has withheld income tax from these monthly payments made to the taxpayer. (R. 26.)

The Tax Court decided, in an opinion review by the entire court, that the payments received by the taxpayer were not received as an annuity under an annuity contract, but were received as a pension in consideration of services rendered in prior years. (R. 28.)

SUMMARY OF ARGUMENT

In 1940 the taxpayer retired as an officer of Anglo, a member of the Standard group, after having worked about 38 years for companies that were or later became affiliated with Standard. Anglo, Standard and the taxpayer entered into an agreement whereby the taxpayer was given a pension or allowance of about \$36,000 per year, with a similar amount to his wife for one year after his death. The taxpayer made no contribution during his 38 years of service to any retirement fund. The Internal Revenue Code, the applicable Treasury Regulations, rulings of the Treasury Department, and court decisions, including one involving facts strikingly similar to those in the present case, indicate that pensions or retiring allowances are compensation for past services and therefore

should be included in gross income. Applying that rule to the facts of this case, the pension allowance which the taxpayer received during the taxable year constituted gross income.

The taxpayer argues that the payments in question represented annuity payments under Section 22 (b) (2) of the Internal Revenue Code which includes only part of each annual payment in gross income until the entire premium or cost has been recovered. Since the entire consideration, allegedly \$415,000, had not been recovered in the taxable year, only part of the payments would be considered taxable if Section 22 (b) (2) applied. While there may have been some evidence to indicate that Anglo had purchased an annuity from Standard, the overwhelming weight of the evidence shows that Anglo had merely arranged with Standard to assume its obligations to the taxpayer. The Tax Court found that Anglo had not intended to purchase an annuity. Since there was substantial support for this finding in the evidence, the conclusion is binding on this Court according to the rule laid down by the Supreme Court.

ARGUMENT

The payments received by the taxpayer during the taxable year under a contract between his former employer, a third party, and himself represented a pension or compensation for past services and therefore constituted gross income under Section 22 (a) and the applicable Treasury Regulations

The taxpayer, a Canadian citizen, retired from the employ of Anglo on July 1, 1940. (R. 26.) From 1902 until that time he had been employed by com-

panies affiliated with or controlled by Standard. (R. 16-17.) Anglo, Standard and the taxpayer entered into a contract under date of March 22, 1940, whereby Anglo transferred to Standard £89,120-0-0, which was converted into United States currency in the amount of about \$415,000, and in consideration of such payment Standard agreed to pay the taxpayer for his life \$3,038.75 per month, effective July 1, 1940, and a similar amount to taxpayer's wife, if she survived the taxpayer, for a period not to exceed twelve months after his death. (R. 23-26.) Beginning with a payment on July 31, 1940, the taxpayer received \$3,038.75 per month through the taxable year 1941. Standard has withheld income tax from these monthly payments to the taxpayer. (R. 26.)

The taxpayer came to the United States on October 4, 1941 (R. 16), and filed an income tax return for the year 1941 including about \$3,000 of the total amount, about \$8,800, received from Standard during the period between October 4, 1941, and December 31, 1941. The Commissioner determined that the entire amount of about \$8,800 constituted gross income. (R. 11.) The Tax Court in an opinion reviewed by the entire court upheld the Commissioner. (R. 26-40.)

Section 22 (a) of the Internal Revenue Code, *supra*, provides that gross income ^{includes} compensation for personal service of whatever kind and in whatever form paid. The Supreme Court has construed this section of the statute as being broad enough to include in taxable income any economic or financial benefit conferred on an employee as compensation, whatever the form or

mode by which it is effected. *Commissioner v. Smith*, 324 U. S. 177, 181, rehearing denied, 324 U. S. 695; see also *Old Colony Tr. Co. v. Commissioner*, 279 U. S. 716, 729.

Section 19.22 (a)-2 of Treasury Regulations 103, *supra*, provides in part that pensions or retiring allowances are income to the recipients. A similar provision has been in the Regulations for more than 27 years.¹ Since Section 22 (a) has been reenacted in substantially the same form a number of times after the Regulations were first promulgated, the Regulations now have the force and effect of law. *Hooker v. Hoey*, 27 F. Supp. 489, 490 (S. D. N. Y.), affirmed *per curiam*, 107 F. 2d 1016 (C. C. A. 2d).

Hooker v. Hoey, *supra*, is strikingly similar to the present case. In that case the taxpayer was a former employee of Vacuum Oil Company and retired from active service in 1924. By resolution of the board of directors he was awarded, in view of his 30 years of service, the sum of \$937.50 monthly, or \$11,250 yearly

¹ Article 32 of Treasury Regulations 45 (1920 ed.), promulgated under the Revenue Act of 1918, of Treasury Regulations 62 (1922 ed.), promulgated under the Revenue Act of 1921, of Treasury Regulations 65, promulgated under the Revenue Act of 1924, and of Treasury Regulations 69, promulgated under the Revenue Act of 1926; Article 52 of Treasury Regulations 74, promulgated under the Revenue Act of 1928, and of Treasury Regulations 77, promulgated under the Revenue Act of 1932; Article 22 (a)-2 of Treasury Regulations 86, promulgated under the Revenue Act of 1934, of Treasury Regulations 94, promulgated under the Revenue Act of 1936, and of Treasury Regulations 101, promulgated under the Revenue Act of 1938; Section 19.22 (a)-2 of Treasury Regulations 103, promulgated under the Internal Revenue Code; and Section 29.22 (a)-2 of Treasury Regulations 111, promulgated under the Internal Revenue Code.

for life. The taxpayer received \$11,250 annually from Vacuum Oil Company during the period from 1924 to 1931. In 1931 Vacuum Oil Company sold all its property to Standard Oil Company of New York, the latter company assuming all obligations and liabilities of the Vacuum Company. From that time forward the Standard Oil Company of New York made the payments to the taxpayer, including the sum of \$11,250 paid in 1933 which the taxpayer claimed were immune from income tax on the ground that it was an annuity.² The court held that the sum in question should have been included in the taxpayer's income for 1933 on the ground that it was a pension or retirement allowance; and that pensions are a form of compensation for personal service which constitute income under Section 22 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and under the applicable Treasury Regulations. The fact that Standard Oil Company of New York took over the Vacuum Company in 1931 and from that time became the payer of the pension was considered immaterial.

This Court has held that additional compensation for past services is taxable income. *Botchford v. Commissioner*, 81 F. 2d 914. Other courts have

² Under Section 22 (b) (2) of the Revenue Act of 1932, c. 209, 47 Stat. 169, none of the amounts received under an annuity contract were treated as income until after the annuitant recovered his premium or other consideration. Under Section 22 (b) (2) of the Internal Revenue Code, *supra*, however, 3% of the total cost of the premium is included in taxable income, and the balance of the annual payments is excluded until the amounts excluded equal the cost of the annuity, after which all of the annual payments are included in gross income.

handed down decisions to the same effect. *Noel v. Parrott*, 15 F. 2d 669 (C. C. A. 4th), certiorari denied, 273 U. S. 754; *Weagant v. Bowers*, 57 F. 2d 679 (C. C. A. 2d); *Fisher v. Commissioner*, 59 F. 2d 192 (C. C. A. 2d); *Bass v. Hawley*, 62 F. 2d 721 (C. C. A. 5th). See also *Old Colony Tr. Co. v. Commissioner*, *supra*. The Treasury Department has repeatedly ruled to the same effect. G. C. M. 14593, XIV-1 Cum. Bull. 50 (1935); I. T. 3292, 1939-1 Cum. Bull. 84; I. T. 3346, 1940-1 Cum. Bull. 62.

Therefore under the statute as construed by the Supreme Court, the Treasury Regulations which have been in effect for more than 27 years, the Treasury rulings, and the decisions, the pension allowance which the taxpayer received in the taxable year, no part of the consideration for which was contributed by him, constitutes gross income as compensation for past services.

The taxpayer contends that the amounts which he received from Standard during the taxable year constituted annuities within the meaning of Section 22 (b) (2) of the Internal Revenue Code (Br. 47-63), and that the sum of \$415,000 was the premium or consideration for the annuity (Br. 63-67). If the taxpayer is correct, only 3% of about \$415,000, that is, \$12,450 per year or \$1,037.50 per month, would be considered as taxable income under Section 22 (b) (2), until the amount excluded from gross income should equal the cost of the annuity, \$415,000. The taxpayer's entire case must rest upon the fact that Anglo paid Standard about \$415,000 in consideration of Standard's promise to pay the taxpayer \$3,038.75

per month, or \$36,465 per year, for the rest of his life and to his wife for one year, if she survived him. If Anglo had made the payments after the taxpayer retired, there would be no factual basis for the taxpayer's argument, and the taxpayer apparently so concedes. (Br. 62.) The taxpayer construes the contract of March 22, 1940, as the purchase of an annuity by Anglo, and contends that he in effect received \$415,000 when this contract was consummated, which represents his cost of the annuity. (Br. 66.) This argument overlooks the fact that the transaction might have been either one of two things: (1) A substitution of Standard for Anglo, in which event the payments were pensions because they were made solely on account of taxpayer's 38 years of service to Standard or to a company affiliated with or controlled by Standard; or (2) the purchase of an annuity in which event the cost of about \$415,000 would have been considered taxable income to the taxpayer in the year of purchase.

While there may have been some evidence to indicate that Anglo had purchased an annuity from Standard, the overwhelming weight of the evidence is to the contrary and shows that Anglo had merely arranged with Standard to assume its obligations to the taxpayer. After weighing the evidence the Tax Court found that Anglo did not intend to purchase an annuity from Standard (R. 38) and that the amounts were received by the taxpayer as a pension for services rendered in prior years (R. 28). If this conclusion is supported by substantial evidence, it is bind-

ing on this Court. *Dobson v. Commissioner*, 320 U. S. 489, rehearing denied, 321 U. S. 231.

The contract of March 22, 1940, between Anglo, Standard and the taxpayer (part of which is included in the Tax Court's findings of the fact (R. 23-26)) expressly provided in part (R. 23-24):

Whereas, Mr. Wolfe is Chairman and Managing Director of the Anglo Company and on March 1, 1931, undertook this assignment *at the request of the Standard Company* on the understanding that if he were eventually retired from the service of the Anglo Company he would receive a life annuity based on the provisions of the superannuation scheme of the Anglo Company as in effect on the date of retirement and that *payment of such sterling pension would be guaranteed by the Standard Company in dollars at an exchange rate of five dollars to the pound.* [Italics supplied.]

This recital shows that the taxpayer undertook his assignment at the request of Standard "on the understanding" that he would receive a life annuity and that payment would be guaranteed by Standard at an exchange rate of five dollars to the pound. This would indicate that Standard was obligated to the taxpayer from the time that he took his position with Anglo in 1931 in regard to a life annuity and that Standard was obliged to pay the annuity if Anglo did not for any reason. More light is thrown on Standard's obligation by the taxpayer's own testimony on cross examination. In regard to his assignment with Anglo after leaving the employ of Imperial, he said (R. 73) "realistically speaking, the offer came

from Standard Oil Company of New Jersey." He also said that when he went to Anglo in 1931, it was not controlled by Standard; but when he retired, the company was wholly owned by Standard. He said that he nominated the board of directors of Anglo, and in all cases his nominations were agreeable to Standard. (R. 72.) If the nominations had not been agreeable to Standard, they could have elected anyone else whom they had chosen. (R. 73.) This testimony indicates that Standard had a much closer interest in the taxpayer's pension than an outside insurance company might have had, and affords a strong reason for the substitution of Standard for Anglo in regard to taxpayer's pension.

The taxpayer also testified that Standard did not guarantee the payment of a retirement allowance to him. (R. 73-74.) Apparently the Tax Court felt that the taxpayer must have been mistaken in this respect, or it decided to give full credit to the recitals in the formal contract which were to the contrary. It is the function of the Tax Court to weigh the evidence and to find the facts where the evidence is in dispute. *Wilmington Co. v. Helvering*, 316 U. S. 164, 168.

Moreover, the documentary evidence in the form of letters, memoranda, etc., shows that from 1931 until the time of taxpayer's retirement in 1940, Standard and Anglo had under consideration the taxpayer's pension or annuity and that the two companies were acting in concert or jointly in this matter. See the letter of August 20, 1931, from Myers of Standard to Harper of Standard (R. 18); the resolution passed

by the board of directors of Anglo on October 22, 1931 (R. 19); memorandum from Standard's committee on annuities dated June 21, 1939, to the executive assistant to the president of Standard (R. 20); letter from executive assistant to the president of Standard to a member of the board of directors of Standard dated June 29, 1939 (R. 20-21); letter from secretary of Anglo dated August 4, 1939, to executive assistant to president of Standard (R. 22); letter from an official of Standard to an official of Anglo, dated January 9, 1940 (R. 22-23); and finally agreement dated March 22, 1940, entered into between Anglo, Standard and the taxpayer (R. 23-26).

All of the evidence described above supports the conclusion of the Tax Court that the agreement of March 22, 1940, between Anglo, Standard and the taxpayer for the payment of the so-called annuity was merely a substitution of Standard for Anglo, and that the transaction did not constitute the purchase of an annuity by Anglo from Standard. The taxpayer paid no premium for this annuity and made no contribution to a retirement fund. His sole consideration was 38 years of service with Anglo and other companies affiliated with or controlled by Standard. The payments of the so-called annuities may have been analogous to annuities but they were not annuities. *Helvering v. Butterworth*, 290 U. S. 365, 369, 370; *Hooker v. Hoey*, 27 F. Supp. 489, 491 (S. D. N. Y.), affirmed *per curiam*, 107 F. 2d 1016 (C. C. A. 2d); G. C. M. 14593, XIV-1 Cum. Bull. 50 (1935); 1 Mertens, Law of Federal Income Taxation (1942 ed.), Section 6.30, p. 283.

If the facts of this case were altered and it appeared that Anglo had used the sum of \$415,000 to purchase an annuity policy from an insurance company, or if it had paid that sum to the taxpayer who in turn purchased the annuity, we would agree that the annual payments received by the taxpayer would have been controlled by Section 22 (b) (2) of the Internal Revenue Code, *supra*. In that event the sum of \$415,000 would have constituted income to the taxpayer at the time of its receipt. *Hackett v. Commissioner*, 159 F. 2d 121 (C. C. A. 1st); *Oberwinder v. Commissioner*, 147 F. 2d 255 (C. C. A. 8th); *Hubbell v. Commissioner*, 150 F. 2d 516 (C. C. A. 6th); *Ward v. Commissioner*, 159 F. 2d 502 (C. C. A. 2d).

Since the taxpayer did not receive the sum of \$415,000, there is no factual basis for a conclusion that the payments made to him after his retirement were made as annuities within the meaning of Section 22 (b) (2). Therefore the payments were made as pensions under Section 22 (a) and the applicable Treasury Regulations. It may be pointed out that if Anglo had in fact purchased an annuity from an insurance company which would pay the annuitant \$36,465 per year, the cost would have been substantially more than \$415,000. The correct figure of the cost of such an annuity was about \$499,000. (R. 37.) Furthermore, there is some doubt whether this cost would cover a joint survivorship annuity which would pay the taxpayer's wife \$36,465 during the year after the taxpayer's death if she survived him. Also, the letter from an official of Standard to an official of Anglo dated January 9, 1940, shows that the tax-

payer's retirement would require the money Anglo provided "plus the additional amounts which Standard * * * will be required to put up * * *." (R. 22-23.) The Tax Court said that there was no showing that £89,120 were required to cover the taxpayer's retirement, as far as concerned the years of service with Anglo, and ^{that} the evidence indicates otherwise. (R. 36-37.) We [^]believe that the Tax Court correctly characterized this evidence as showing a mere contribution by Anglo to a general fund, rather than the purchase of an annuity. (R. 37.)

CONCLUSION

The decision of the Tax Court is correct and should therefore be affirmed.

Respectfully submitted.

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MARCH 1948.

